

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
Allen Leeds) DA 01-2266

ORDER ON RECONSIDERATION

Adopted: January 29, 2007

Released: January 29, 2007

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. We have before us a Petition for Reconsideration filed by Allen Leeds ("Leeds"). Leeds seeks reversal of a decision by the former Auctions and Industry Analysis Division ("Division") that denied his request for a grace period to allow him additional time in which to make required installment payments for two Broadband Radio Service ("BRS") licenses he won in Auction No. 6. As a small business, Leeds was eligible to participate in the Commission's installment payment plan for BRS licenses and elected to do so. Under the Commission's rules at the time, Leeds was permitted 90 days after an installment payment due date to submit the required payment or file a grace period request. After submitting his first installment payment on the two licenses within that 90-day period, Leeds failed to submit his second payment or file a timely grace period request. Pursuant to the Commission's rules, the licenses therefore canceled automatically. Three months after the automatic cancellation, Leeds filed a request for additional time in which to make his installment payments. The Division denied this request.

1 Petition for Reconsideration, filed on November 1, 2001 ("Petition").

2 Letter from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to James A. Stenger, Counsel for Allen Leeds, 16 FCC Rcd 17,621 (2001) ("Division Order"). The Auctions and Industry Analysis Division was the predecessor of the current Auctions and Spectrum Access Division. The BTA licenses in question were for Lexington, Kentucky (B252) and Rockford, Illinois (B380).

On July 29, 2004, the Commission released a Report and Order and Further Notice of Proposed Rulemaking that amended the rules governing the Multipoint Distribution Service ("MDS") in order to encourage the deployment of broadband services by commercial and educational entities. Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14,165 (2004) ("BRS Report and Order"). To better reflect the forward-looking vision for these services, the Commission renamed MDS as BRS. Because the new rules are now in effect, we refer to the service by its new name.

3 See 47 C.F.R. § 21.960(b) (1996). In the BRS Report and Order, adopted in June 2004, the Commission eliminated Part 21 of its rules and consolidated its rules for BRS in Part 27. BRS Report and Order, 19 FCC Rcd at 14,236-38 24 ¶¶ 186-90. See also infra note 11 regarding the Commission's 1997 modification of its installment payment rules. Neither the 1997 modification of the installment payment rules nor the 2000 consolidation of the BRS rules in Part 27 is relevant to the instant case.

Leeds subsequently filed the instant Petition. For the reasons set forth below, we find the arguments presented on behalf of Leeds are without merit and we deny Leeds's Petition.

II. BACKGROUND

2. *The Commission's Installment Payment Program.* When the Commission first adopted competitive bidding rules in 1994, it established an installment payment program under which qualified small businesses that won licenses in certain services were allowed to pay their winning bids in quarterly installments over the initial term of the license.⁴ In deciding to offer installment payment plans, the Commission reasoned that in appropriate circumstances such plans would, by reducing the amount of private financing small entities needed in advance of auctions, help to provide opportunities for small businesses to participate in the provision of spectrum-based services.⁵ Licensees paying in installments were generally allowed to pay only interest in the early years of the license term.⁶ In 1997, the Commission discontinued the use of installment payments for future auctions,⁷ but allowed entities that were already paying for licenses in installments to continue doing so.⁸

3. Under the installment payment rules in effect at the time Leeds failed to submit the payments that were due, licensees were permitted 90 days after a payment due date to either submit the payment or file a grace period request with the Commission.⁹ Any licensee who failed to do so was in

⁴ Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2389-91 ¶¶ 231-40 (1994) (“*Competitive Bidding Second Report and Order*”). The first Commission auction for which installment payments were available was Auction No. 2 (218-219 MHz Service), which concluded on July 29, 1994.

⁵ *Id.* at 2389-90 ¶ 233. The goal of providing opportunities for small businesses to participate in the provision of spectrum-based services is set forth at 47 C.F.R. §§ 309(j)(3)(B) & 309(j)(4)(D).

⁶ *See* 47 C.F.R. §§ 1.2110(e)(3)(iii) & (iv) (1996) and 21.960(b)(3)(iii) & (iv) (1996).

⁷ The Commission discontinued the use of installment payments based on its findings that (1) installment payments are not necessary to ensure meaningful opportunities for small businesses to participate successfully in auctions; (2) the Commission must consider all of the objectives of Section 309(j), including the development and rapid deployment of new services for the benefit of the public; (3) filings for bankruptcy by entities unable to pay their winning bids may result in delays in the deployment of service; and (4) requiring the payment of bids in full within a short time after the close of auctions ensures greater financial accountability from applicants. Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Third Report and Order and Second Further Notice of Proposed Rulemaking*, 13 FCC Rcd 374, 397-98 ¶¶ 38-39 (1998) (“*Part 1 Third Report and Order*”). The Commission affirmed this decision in 2000. Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15,293, 15,322 ¶ 55 (“*Part 1 Reconsideration of Third Report and Order*”). The last Commission auction for which installment payments were available was Auction No. 11 (broadband PCS F block), which ended on January 14, 1997.

⁸ *Part 1 Third Report and Order*, 13 FCC Rcd at 436 ¶ 106.

⁹ 47 C.F.R. § 1.2110(e)(4)(i) & (ii) (1996); 47 C.F.R. § 21.960(b)(4)(i) & (ii) (1996). Licensees were permitted to request a grace period of 90 to 180 days.

default.¹⁰ If the licensee defaulted, the license canceled automatically and the Commission instituted debt collection procedures.¹¹

4. *Allen Leeds*. As noted above, Leeds was the winning bidder for two BRS licenses in Auction No. 6, which concluded on March 28, 1996.¹² The licenses were granted on August 16, 1996.¹³ Consistent with his eligibility and election to participate in the Commission's installment payment loan program, Leeds signed the Promissory Notes and Security Agreements that set forth his payment obligations for the two licenses on November 18, 1996.¹⁴ Leeds was required to make his initial quarterly

¹⁰ 47 C.F.R. § 1.2110(e)(4)(i), (ii), & (iii) (1996); 47 C.F.R. § 21.960(b)(4)(i), (ii), & (iii) (1996).

¹¹ 47 C.F.R. § 1.2110(e)(4)(iii) (1996); 47 C.F.R. § 21.960(b)(4)(iii) (1996). In 1997, the Commission amended its installment payment rules to provide licensees with an automatic grace period. Under these rules, which became effective on March 16, 1998, if a licensee did not make full and timely payment of an installment, it was automatically granted a 90-day period during which it was allowed to pay the installment along with a 5 percent late fee. If it did not submit the missed installment payment and the 5 percent late fee before the expiration of this 90-day period, the licensee was automatically granted a second 90-day period during which it could remit payment along with an additional late fee equal to 10 percent of the missed payment. A licensee's failure to make payment, including the associated late fees, by the end of the second 90-day period placed it in default. 47 C.F.R. § 1.2110(f)(4)(i) (1998); *Part 1 Third Report and Order*, 13 FCC Rcd at 436 ¶ 106. In 2000, the Commission simplified these rules by replacing the two 90-day grace periods with two quarterly grace periods. 47 C.F.R. § 1.2110(g)(4)(iv) (2000). This change aligned the schedule for late payments with the quarterly schedule of regular installment payments. *Part 1 Reconsideration of Third Report and Order*, 15 FCC Rcd at 15,310 ¶ 28.

Notwithstanding these amendments, certain features of the Commission's installment payment rules have remained the same since they were first adopted in 1994. Thus, the rules have always conditioned the grant of licenses upon the full and timely performance of licensees' payment obligations and have provided that, upon a licensee's default, the license cancels automatically and the Commission institutes debt collection procedures. *See, e.g.*, 47 C.F.R. § 1.2110(e)(4) (1994) and 47 C.F.R. § 1.2110(f)(4) (1998). *See also* Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Third Order on Reconsideration of the Third Report and Order*, 19 FCC Rcd 2551 (2004). In this Order addressing the inapplicability of 47 C.F.R. § 1.2104 of the Commission's rules to installment payment defaults, the Commission discussed its 1997 decision not to deviate from its license-cancellation-plus-debt-collection rule for installment payment defaults and explained the reasonableness of this decision. Noting that automatic license cancellation is not unique to defaults on installment payments (licenses terminate automatically, for example, when licensees fail to build out in compliance with the Commission's rules, whether they are paying their winning bids in installments or have paid them in full in a lump sum), the Commission explained that its rules are designed to encourage entities that cannot meet their financial obligations to exit the auction process sooner rather than later in order to avoid delays in licensing spectrum to entities that are able to provide service to the public. Thus, the consequence of withdrawing a high bid during an auction, when a new high bidder can still emerge, is less severe than the consequence of defaulting after the close of an auction. Similarly, the consequence of a post-licensing default, such as an installment payment default or a failure to meet construction or service requirements, is more severe than the consequence of a pre-licensing default because the former could adversely affect service to the public much longer than the latter. *Id.* at 2561-62 ¶¶ 29-31.

¹² Leeds was the high bidder on the Lexington, Kentucky (B252) and Rockford, Illinois (B380) Basic Trading Areas ("BTAs"). "Winning Bidders in the Auction of Authorizations to Provide Multipoint Distribution Service in 493 Basic Trading Areas," *Public Notice* (rel. March 29, 1996).

¹³ "FCC Announces Grant of MDS Authorizations," *Public Notice*, Report No. D-871, 1996 WL 469184 (F.C.C.) (rel. August 16, 1996).

¹⁴ Note and Security Agreement for MDB380; Note and Security Agreement for MDB252.

installment payments on or before November 30, 1996.¹⁵ Leeds submitted these payments on December 27, 1996, which was within the 90-day period permitted under the rules at the time.

5. Subsequently, Leeds owed a second installment payment on each license on February 28, 1997, and he had 90 days after that date, i.e., until May 30, 1997, to submit those payments or file a grace period request.¹⁶ As Leeds acknowledges, he failed to make these second installment payments.¹⁷ On May 31, 1997, the subject licenses therefore canceled automatically and Leeds became subject to debt collection procedures pursuant to Section 21.960(b)(4)(iii).¹⁸ Three months past the time permitted in the rules for doing so, Leeds filed a letter dated August 29, 1997, seeking additional time in which to make his February payments.¹⁹ In this letter, Leeds also requested that the Commission reduce the amount of his obligation for the two licenses and give him a corresponding refund of funds previously paid to the Commission.²⁰

6. On October 2, 2001, the Division denied Leeds's untimely request for a grace period and his request for an adjustment of his bid and a corresponding refund.²¹ With respect to his grace period request, Leeds had argued that Commission staff had orally extended his second installment payment due date until May 30, 1997, thereby extending his deadline to make a payment or file a grace period request until August 1997.²² The Division found, however, that Leeds had offered no details or documentation to support this claim.²³ Rather, Leeds had submitted correspondence that the Division found suggested that his counsel did not understand the Commission's rules then in effect. Specifically, Leeds had submitted a letter dated December 3, 1996, requesting that Commission staff issue a new amortization schedule due to his one-month delay in submitting his initial installment payments. Leeds had also submitted a copy of a letter to himself from his counsel dated February 24, 1997, which included Leeds's counsel's interpretation of the Commission's rules and legal advice to Leeds regarding his payment obligations. The Division observed that even assuming that Commission staff had stated that the deadline for Leeds's second installment payment had been extended, such advice would have been contrary to the rule and such statements would not have bound the Commission.²⁴ In denying Leeds's request for a reduction of the amount of his obligation for the two licenses, the Division noted that at the close of an auction winning bidders become obligated to the Commission for the full amount of their winning bids.²⁵ The

¹⁵ 47 C.F.R. § 1.2110(e)(3) (1996); Note and Security Agreement for MDB380 (Rockford, IL BTA) at 1; Note and Security Agreement for MDB252 (Lexington, KY BTA) at 1.

¹⁶ Note and Security Agreement for MDB380 at 1; Note and Security Agreement for MDB252 at 1.

¹⁷ Petition at 3.

¹⁸ 47 C.F.R. § 21.960(b)(4)(iii) (1996).

¹⁹ Letter from James A. Stenger, Counsel for Allen Leeds, to Mark Rossetti, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, dated August 29, 1997, at 2.

²⁰ *Id.* at 3-4.

²¹ *Division Order*, 16 FCC Rcd at 17,621.

²² *Id.*

²³ *Id.*

²⁴ *Id.* (citing *Office of Personnel Management v. Richmond*, 496 U.S. 414, 110 S.Ct. 2465 (1990) ("*Richmond*"); Mary Ann Salvatoriello, *Memorandum Opinion and Order*, 6 FCC Rcd 4705, 4707-08 ¶ 22 (1991) ("*Salvatoriello*"); and Request for Review of the Decision of the Universal Service Administrator by Merced Union High School District, Merced, California, *Order*, 15 FCC Rcd 18,803, 18,805 ¶ 7 (CCB 2000) ("*Merced*").

²⁵ *Division Order*, 16 FCC Rcd at 17,623.

Division concluded that to allow bidders to adjust their bids post-auction would encourage insincere bidding and would therefore interfere with the Commission's goal of ensuring that licenses are auctioned to those parties that value them the most and have the financial qualifications necessary to construct operational systems and provide service to the public.²⁶

7. Leeds now requests reconsideration of the *Division Order* on four separate grounds. First, Leeds contends that his grace period request was timely because he alleges that Commission staff orally modified his payment schedule. Leeds concludes that the Commission therefore should be estopped from denying the grace period request.²⁷ Second, Leeds argues that the principles of equitable tolling require the Commission to treat the grace period request as timely filed.²⁸ Third, Leeds claims that the Commission's acceptance of regulatory fees and applications to modify the licenses as well as its delay in responding to his grace period request constitute a waiver of the Commission's right to deny his grace period request.²⁹ Last, Leeds claims entitlement to a notice to show cause and a hearing under Section 312(c) of the Communications Act of 1934, as amended.³⁰

III. DISCUSSION

8. As we explain below, the arguments submitted by Leeds lack merit and do not warrant reconsideration of the *Division Order*. The standard for a petition for reconsideration is provided in Section 1.106 of the Commission's rules.³¹ As the Commission has stated, "Reconsideration is warranted only if the petitioner cites material error of fact or law or presents new or previously unknown facts and circumstances which raise substantial or material questions of fact that were not considered and that otherwise warrant [the] review of [the] prior action."³² Leeds has neither cited errors nor presented new facts that meet this standard.

9. Leeds's arguments focus on an alleged oral modification by an unidentified member of the Commission staff of the terms of his written notes and security agreements. According to Leeds, a member of the Commission staff "advised [his] counsel that [the Commission] would treat the payment remitted in December 1996 as the February 1997 payment. . . ." ³³ Leeds fails to specify the name of the staff member, the date of the conversation, the alleged terminology used by the staff member, or even if the conversation occurred by telephone or in person. Because of Leeds's failure to provide any details or documentation to support his claims, we are not persuaded by this argument.

10. Leeds nevertheless seeks to estop the Commission from denying his grace period request by arguing that he was correct in his contention that Commission staff modified his payment schedule. Leeds argues that the letters of December 3, 1996, and February 24, 1997, that he submitted to the

²⁶ *Id.*

²⁷ Petition at 5.

²⁸ *Id.* at 7.

²⁹ *Id.* at 9.

³⁰ *Id.* at 10 (citing 47 U.S.C. § 312(c)).

³¹ 47 C.F.R. § 1.106.

³² Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules, *Order on Reconsideration*, 16 FCC Rcd 5022, 5028 ¶ 18 (2001) (citing 800 Data Base Access Tariffs and the 800 Service Management System Tariff and Provision of 800 Services, *Order on Reconsideration*, 12 FCC Rcd 5188, 5202 n.84 (1997) (citing D.W.S., Inc., *Memorandum Opinion and Order*, 11 FCC Rcd 2933 ¶ 4 (1996))).

³³ Petition at 2.

Commission serve to memorialize an alleged oral modification of his installment payment deadlines by Commission staff. Thus, Leeds concludes that the two letters mandate that the Commission retroactively grant the grace period request.³⁴ In support of this claim, Leeds offers an affidavit by his former counsel attesting to communications with Commission staff.³⁵

11. We agree with the Division that the correspondence offered by Leeds does not demonstrate that his payment schedule was modified, but rather suggests that his counsel did not understand the Commission's rules then in effect.³⁶ Moreover, even assuming *arguendo* that staff made the statements that Leeds contends were made, such statements could not have effected a modification to Leeds's payment schedules. It is a well-established principle that Commission staff lack the authority to modify Commission rules.³⁷ Indeed, within the specific context of BRS licensing, the Commission had previously stated that alleged staff "statements neither bind the Commission nor prevent [the Commission] from enforcing Commission regulations. The Commission has specifically held that parties who rely on staff advice or interpretations do so at their own risk."³⁸ Therefore, contrary to the assertions in his reconsideration petition, Leeds or his counsel knew or should have known that a staff member lacked the authority to orally modify his payment obligations.

12. Furthermore, the Promissory Note and Security Agreements signed by Leeds stipulate in two separate places that payment schedule modifications can only be established in writing by the Commission.³⁹ As signatory to these agreements, Leeds was responsible for knowledge of their content

³⁴ *Id.* at 5-6.

³⁵ *Id.*, Exhibit A, Declaration of Amy L. Brett, Esq., dated October 24, 2001.

³⁶ *Division Order*, 16 FCC Rcd at 17,622. The letter dated December 3, 1996, appears to replace the 90-day non-delinquency period provided for in the Commission's rules with an oral revocation of Leeds's amortization schedule specified in the Security Agreements he signed and an oral grant of a new amortization schedule. The letter dated February 24, 1997, to Allen Leeds from his counsel states that Leeds's first installment payments were not due in November of 1996, but were instead due in May of 1997, contrary to Commission rules and the Security Agreements signed by Leeds. In essence, this second letter appears to erroneously advise Leeds that he may ignore the first due date for his installment payments and that his payment schedule will be modified whenever he takes advantage of the 90-day non-delinquency period available under the rules at the time.

³⁷ See, e.g., Daniel R. Goodman, *Memorandum Opinion and Order on Reconsideration*, 13 FCC Rcd 21,944, 21,972-73 ¶ 53 (1998) ("Erroneous advice received from a government employee is insufficient [to warrant estoppel against the government], particularly when the relief requested would be contrary to an applicable statute or rule."). See also Additional Information Regarding Broadband PCS Spectrum Included in the Auction Scheduled for March 23, 1999, *Order*, 14 FCC Rcd 6561 ¶ 4 (1999) ("[R]epresentations, if any, made by staff members do not bind the Commission to a course of regulatory action unless such action has been duly authorized in expressly delegated terms."); Application of San Diego MDS Co., *Memorandum Opinion and Order*, 19 FCC Rcd 23,120, 23,125 ¶ 12, 23,126 ¶ 13 (2004) ("[D]ue process does not compel the Commission to follow erroneous decisions by Commission staff . . . Moreover, as we have stated many times, parties doing business before the Commission may not claim reliance on informal staff advice to excuse non-compliance with regulatory requirements.") (citing *Salvatoriello*, 6 FCC Rcd at 4708 ¶ 22 ("Erroneous advice received from a government employee is insufficient [to warrant estoppel against the government], particularly when the relief requested would be contrary to an applicable statute or rule."); Texas Media Group, Inc., *Memorandum Opinion and Order*, 5 FCC Rcd 2851, 2852 ¶ 8 (1990), *aff'd sub nom*, *Malkan FM Associates v. FCC*, 935 F.2d 1313 (D.C. Cir. 1991) ("It is the obligation of interested parties to ascertain facts from official Commission records and files and not rely on statements or informal opinions by the staff.")).

³⁸ Hinton Telephone Co., *Memorandum Opinion and Order on Reconsideration*, 10 FCC Rcd 11,625, 11,637 ¶ 42 (1995).

³⁹ The Notes for both Rockford and Lexington include the following statement: "The Note may not be changed, modified, waived, terminated or discharged orally, but only by such agreement in writing executed by the party against whom enforcement of any such change, modification, waiver, termination, or discharge is sought."

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and stipulations. From the plain language of the agreements he had signed, Leeds should have known that his payment schedules could be modified only in writing. Leeds does not contend that any written modifications were made to these payment schedules.

13. Leeds, like any other applicant or licensee, was obligated to know the Commission's rules.⁴⁰ In particular, after electing to participate in the installment payment program, Leeds was required to know and comply with the Commission's rules regarding his payment obligations. Pursuant to 47 C.F.R. § 21.960(b)(4)(i), Leeds had an automatic 90-day period after the due date of February 28, 1997, to submit his second installment payment or file a request for a grace period. As stated above, he did neither. We also note that despite claiming that the Commission staff had modified his payment schedule, Leeds submitted no payments after his initial payment in December 1996.

14. In finding that any staff statement indicating that the Leeds installment payment deadlines had been extended would have been contrary to the Commission's rules and that the Commission would not be bound by such statements, the Division cited, *inter alia*, the Supreme Court's decision in *Office of Personnel Management v. Richmond*.⁴¹ Leeds claims that the Division's reliance on *Richmond* is misplaced because the oral modification of his installment payment schedules by Commission staff was not contrary to any statute, rule, or regulation and thus not governed by *Richmond*.⁴² Leeds argues that with the exception of certain matters not relevant to his request, all matters related to implementation of installment payment plans were left to the discretion of the Commission, and therefore a member of the Commission staff would have been acting within his authority when he orally modified Leeds's installment payment plans.⁴³

15. We find this argument to be without merit. Leeds's assertion that the alleged oral modification of his installment payment schedules was not contrary to any statute, rule, or regulation is wrong. As already explained, Leeds's payment schedules were established by rule;⁴⁴ pursuant to notes and security agreements Leeds executed, these schedules could not be altered except in writing;⁴⁵ and the

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Rockford Note at 5; Lexington Note at 5. Similarly, the Security Agreements for both Rockford and Lexington state that "[n]one of the terms or provisions of this Agreement may be waived, altered, modified or amended except by an instrument in writing, duly executed by the Commission. The Commission shall not by any act, delay, omission or otherwise be deemed to have waived any of its rights or remedies under this Agreement, and no waiver shall be valid unless in writing, signed by the Commission, and only to the extent therein set forth." Rockford Security Agreement at 5; Lexington Security Agreement at 5.

⁴⁰ Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines, CI Docket No. 95-6, *Report and Order*, 12 FCC Rcd 17,087, 17,099 ¶22 (1997) ("The Commission expects, and it is each licensee's obligation, to know and comply with all of the Commission's rules.").

⁴¹ *Division Order*, 16 FCC Rcd at 17,622 (citing *Richmond*, 496 U.S. 414).

⁴² Petition at 6. Leeds does not address *Salvatoriello*, 6 FCC Rcd 4705, 4707 ¶ 22 (1991), or *Merced*, 15 FCC Rcd 18,803, 18,805 ¶ 7 (CCB 2000), two other cases cited by the Division in which the Commission and the former Common Carrier Bureau, respectively, concluded that the Commission is not estopped from enforcing its rules in a manner that is inconsistent with the advice provided by an employee, particularly when the relief requested would be contrary to an applicable statute or rule. Neither of these cases has been overruled.

⁴³ Petition at 7.

⁴⁴ 47 C.F.R. §§ 1.2110(e)(4) (1996), 21.960(b)(4) (1996).

⁴⁵ See Note and Security Agreement for MDB380; Note and Security Agreement for MDB252. The Public Notice of August 16, 1996, in which the Commission granted the Rockford and Lexington licenses, stated that "[f]or small business licensees who elect to participate in the installment payment plan, grant of each authorization is expressly

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automatic cancellation of the licenses upon Leeds's failure to make timely installment payments was required by rule.⁴⁶ The courts have long held that a private litigant seeking to estop the government bears a heavy burden.⁴⁷ Indeed, the Supreme Court took pains in *Richmond* to emphasize that it had reversed every finding of estoppel against the government that it had reviewed.⁴⁸ The Court also indicated that, in the course of rejecting estoppel arguments, it had left open only the possibility that "some type of 'affirmative misconduct' might give rise to estoppel against the Government."⁴⁹ The Supreme Court has denied claims of estoppel against the government where it was undisputed that a government agent or employee provided information to the claimant that was contrary to either statute or regulation.⁵⁰ Leeds has not only failed to show affirmative misconduct on the part of a Commission employee, he has not even named the particular employee he alleges changed his installment payment schedule or provided any details regarding what this employee is supposed to have said.⁵¹ We therefore find that even if *Richmond* is not controlling in this case, Leeds's estoppel argument fails under longstanding precedents of the Supreme Court.⁵²

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conditioned upon execution by the licensee of a note documenting the licensee's installment payment obligations and a security agreement commemorating the Commission's security interest in the authorization in the event of default." "FCC Announces Grant of MDS Authorizations," *Public Notice*, Report No. D-871, 1996 WL 469184 (F.C.C.) (rel. August 16, 1996).

⁴⁶ 47 C.F.R. §§ 1.2110(e)(4)(iii) and 47 C.F.R. § 21.960(b)(4)(iii) (1996).

⁴⁷ See, e.g., *Ingalls Shipbuilding, Inc. v. U.S. Dep't of Labor*, 976 F.2d 934, 937 (5th Cir. 1992) ("The private litigant who would estop the government bears a very heavy burden."). Parties claiming estoppel have been required to show more than "mere negligence, delay, inaction or failure to follow an internal agency guideline." *Id.* at 938 (citation omitted). Such parties have, rather, been required to show that an agent of the government committed "affirmative misconduct." See, e.g., *Drozdz v. INS*, 155 F.3d 81, 90 (2^d Cir. 1998) ("The doctrine of equitable estoppel is not available against the government 'except in the most serious circumstances' and is applied 'with the utmost caution and restraint' . . . claim falls short of the 'affirmative misconduct' that is a prerequisite to estoppel." (citations omitted)).

⁴⁸ *Richmond*, 496 U.S. at 422.

⁴⁹ *Id.* at 421 (citing *INS v. Hibi*, 414 U.S. 5, 8 (1973) (*per curiam*)).

⁵⁰ See, e.g., *Schweiker v. Hansen*, 450 U.S. 785, 790 (1981) (*per curiam*) (denying claim of estoppel where claimant was denied social security benefits because she failed to comply with regulatory requirement based on erroneous information provided by field representative of Social Security Administration ("SSA"); concluding that representative's errors fell short of conduct that would raise serious question whether SSA was estopped from insisting upon compliance with valid regulation); *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 386 (1932) (concluding that erroneous information provided to claimant regarding eligibility for crop insurance by agent of Federal Crop Insurance Corporation ("Corporation") did not estop the Corporation from enforcing valid regulation that excluded claimant's crop from coverage; stating that "anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power"). See also *Malkan FM Associates*, 935 F.2d 1313 (D.C. Cir. 1991) (finding that FCC's 1985 FM rules explained with sufficient clarity that antenna height was a factor to be considered at the acceptability stage of applications and that contrary statement by Mass Media Bureau official at Commission-sponsored seminar should not engender reliance).

⁵¹ As noted above, the letters submitted by Leeds allegedly memorializing a staff member's oral agreement do not support his allegation that the Commission modified his payment schedule.

⁵² In *Richmond* the Court denied a claim of estoppel against the U.S. Government on a relatively narrow ground, i.e., that payments of money from the Federal Treasury are limited to those authorized by statute. *Richmond*, 496 U.S. at 415-416. Given other precedents of the Court, we need not decide how *Richmond* would be applied here.

16. Next, Leeds contends that the principle of equitable tolling of statutory deadlines requires the Commission to treat his regulatory request for a grace period as timely filed.⁵³ Leeds states that the principle of equitable tolling holds that when a party pleads and proves equitable reasons that excuse his failure to meet a statutory deadline, the party is entitled to toll that deadline.⁵⁴ Yet, without citing a single case that applies the equitable tolling doctrine to a Commission regulatory deadline, Leeds argues that his failure to meet an installment payment deadline may be excused because it is the result of justifiable reliance on the advice of a government officer. We find that Leeds's equitable tolling argument fails. As previously explained, Leeds had an obligation to know the Commission rules applicable to the BRS licenses. Further, as discussed above, staff lacked the authority to modify orally the Commission's rules, payment deadlines, or the terms of the Notes and Security Agreements, and Leeds knew or should have known this. Accordingly, Leeds's reliance on the precedent of *Bull v. Comer* is misplaced. In *Bull v. Comer*, a government agency issued a written notification that was incorrect and that was relied upon by the plaintiff to his detriment. In contrast, Leeds did not receive a written modification of his installment payment schedule as was required under the Notes and Security Agreements signed by Leeds and the Commission, and he had no legitimate reason to believe that the deadline for filing a grace period request had been extended.

17. Contrary to Leeds's assertion, we also find that neither the Commission's delay in responding to his late-filed grace period request nor its inaction in the wake of his payment of regulatory fees and his filing of applications to modify canceled licenses constitutes a waiver of the Commission's right to deny his request for additional time in which to submit his installment payments.⁵⁵ Leeds argues that the Commission waived its right to deny his grace period request because it failed to address his correspondence seeking a new amortization schedule.⁵⁶ According to Leeds, "there is no evidence that the Commission ever challenged Petitioner's claim of a modified payment schedule."⁵⁷ The Commission was under no obligation to respond to Leeds's correspondence proposing to modify his regulatory obligations. It is within the agency's discretion to use its limited resources for those tasks it considers to be most in need of attention.⁵⁸ We therefore reject the suggestion that the Commission would forfeit its right to enforce its rules because it gave other matters priority over Leeds's letter.

18. With respect to his assertions regarding the regulatory fees and license modification applications he filed, it appears that Leeds is attempting to argue that the Commission's acceptance of regulatory fees and applications he filed in connection with automatically canceled licenses somehow constitutes a constructive waiver of his installment payment deadlines on the part of the Commission, and that therefore his licenses did not cancel automatically in May of 1997. This argument is without merit, however, and Leeds's reliance on cases involving the constructive waiver of installment payment

⁵³ Petition at 7-8.

⁵⁴ *Id.* at 7 (citing *Bull S.A. v. Comer*, 55 F.3d 678, 681 (D.C. Cir. 1995)).

⁵⁵ Petition at 9.

⁵⁶ The first letter submitted by Leeds with his reconsideration petition, dated December 3, 1996, sought a new amortization schedule. It is not clear if Leeds is arguing that the Commission had a duty to respond to the second letter submitted with his reconsideration petition, dated February 24, 1997, which was a letter from his counsel addressed to him.

⁵⁷ Petition at ii.

⁵⁸ *See, e.g., Natural Resources Defense Council v. SEC*, 606 F.2d 1031, 1056 (D.C. Cir. 1979) (It is "the agency which alone is cognizant of the many demands on it, its limited resources, and the most effective structuring and timing of proceedings to resolve those competing demands.").

deadlines is inappropriate here.⁵⁹ The cases on which Leeds relies did not involve the acceptance of regulatory fees or license modification applications. Indeed, Leeds cites no decisions in which the acceptance by the Commission of regulatory fees or modification applications for canceled licenses was held to constitute a constructive waiver of the licensee's installment payment obligations. Furthermore, unlike the licensees in the cases he cites, Leeds did not make payments towards his license debt obligation past the time of automatic cancellation.⁶⁰ In fact, since making his first installment payment ten years ago, Leeds has made no payments at all to the Commission towards his debt obligation for the licenses.

19. Leeds filed the regulatory fee payments and modification application in question three years after the licenses had canceled and did so of his own accord, not at the behest or urging of the Commission.⁶¹ Leeds knew or should have known that pursuant to the Commission's rules the subject licenses had automatically canceled in May of 1997. Leeds's unilateral decision to submit regulatory fee payments and modification applications to the Commission does not retroactively undo the automatic operation of the Commission's rules that had occurred three years earlier. Moreover, the Commission's rules state that it will refund regulatory fees filed in error only upon a request to do so, and Leeds has not filed such a request.⁶² We therefore reject Leeds's argument that the Commission's ministerial acceptance of regulatory fee payments or modification applications for automatically canceled licenses constitutes a constructive waiver of the installment payment rules.

20. Leeds alternatively argues that the Division erred by not providing him with notice to show cause and a hearing under Section 312(c) of the Communications Act of 1934.⁶³ Section 312 governs the revocation of licenses by the Commission. Under Section 312(c), the Commission must, before revoking a license, serve the licensee with an order to show cause why the license should not be revoked and then must designate a time and place for a hearing. Leeds's assertion that he is entitled to such notice and hearing is incorrect because his licenses were not revoked. Revocation is an action the Commission may take in response to particular sets of circumstances enumerated in Section 312(a).⁶⁴ In contrast, licenses

⁵⁹ Leeds relies on the following decisions: Letter from Daniel B. Phythyon, Chief, Wireless Telecommunications Bureau, to Thomas Gutierrez, Esq., Counsel for Lancaster Communications, Inc., DA 98-2052, 1998 WL 709412 (F.C.C.) (rel. Oct. 9, 1998); Letter from Amy J. Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to Meredith S. Senter, Jr., Esq., Counsel for Cordell Engineering, 14 FCC Rcd 5003 (1999); Letter from Thomas J. Sugrue, to Lloyd W. Coward, Esq., Counsel for TE-MCG Consortium, 14 FCC Rcd 2173 (Wireless Telecom. Bur. 1999).

⁶⁰ Although post-cancellation payments alone are not sufficient to revive a canceled license, they have been considered as factors to support a waiver of the automatic cancellation rule. *See, e.g.,* Leaco Rural Telephone Cooperative, Inc. Request for Waiver and Reinstatement of Broadband Radio Service Authorization for the Hobbs, New Mexico Basic Trading Area, MDB191, *Order*, 21 FCC Rcd 1182 (2006); Advanced Communications Solutions, Inc. Request for Waiver of Section 1.2110(g)(4)(iv) and Reinstatement of 900 MHz Specialized Mobile Radio Licenses, *Order*, 21 FCC Rcd 1627 (2006).

⁶¹ Leeds makes no representations that he paid regulatory fees or filed modification applications prior to the automatic cancellation of his licenses in May of 1997. According to the documentation submitted with his reconsideration petition, it appears that Leeds first paid regulatory fees for BRS stations on September 21, 2001. A review of Commission records reveals that the first "modification" applications he filed were seven applications for response station hubs filed on August 17, 2000. However, after the automatic cancellation of the authorizations in May of 1997, there was nothing to assign or modify. *See Jefferson Radio Co. v. FCC*, 340 F.2d 781, 783 (1964).

⁶² 47 C.F.R. §1.1160.

⁶³ Petition at 10 (citing 47 U.S.C. § 312(c)).

⁶⁴ 47 U.S.C. § 312(a). Section 312 lists seven discrete grounds for revoking a license. None of these enumerated grounds applies to the Leeds licenses.

cancel automatically when installment payments are not timely made, and no Commission action is required. Leeds's licenses canceled automatically because of his failure to remit installment payments in a timely manner consistent with the Commission's rules at the time.⁶⁵ For this reason, Section 312 is inapplicable here.

21. The Commission made the policy judgment that it would adopt general competitive bidding rules as well as rules for BRS that require full and timely payment of winning bids. In other words, the condition of full and timely payment of winning bids was imposed on every BRS license by rule. Furthermore, these rules prescribe the consequences of default, which is the automatic cancellation of the BTA authorization.⁶⁶ Leeds argues in effect that the Commission may not adopt a rule that results in automatic cancellation of licenses without a hearing. We reject this argument. With respect to installment payment plans for licenses won at auction, it was within the Commission's discretion to choose to proceed by rulemaking, as opposed to making the sort of individual fact determinations that are necessary under Section 312(a).⁶⁷ The Commission need not hold individual hearings on matters already decided by rule each time the rule is applied.⁶⁸

22. Moreover, under Title III of the Communications Act,⁶⁹ the Commission is empowered to create licensing schemes and impose conditions on the usage and retention of licenses.⁷⁰ Acceptance of a license constitutes an agreement to the conditions set forth.⁷¹ A hearing would be required only if an

⁶⁵ 47 C.F.R. § 21.960(b)(4)(iii).

⁶⁶ 47 C.F.R. § 21.960(b)(4)(iii)(1996).

⁶⁷ See *SEC v. Chenery Corp.*, 332 U.S. 194, 203, 67 S.Ct. 1575, 1580 (1947) ("[T]he choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." (citing *Columbia Broad. Sys. v. United States*, 316 U.S. 407, 421, 62 S. Ct. 1194, 1202 (1942))).

⁶⁸ *AT&T Co. v. FCC*, 539 F.2d 767, 774 (D.C. Cir. 1976) (rejecting petitioner's argument that Commission was required by Section 309 to hold hearing prior to grant of applications) ("The Commission, of course, has 'a large discretion to avoid time-consuming hearings in this field whenever possible.' . . . Moreover, the Commission may obviate the need for repetitious hearings on previously considered issues of public policy by establishing, through rulemaking, criteria against which to judge specific applications.") (citations omitted). See also *Remedial Steps for Failure to Comply with Digital Television Construction Schedule, Report and Order and Memorandum Opinion and Order on Reconsideration*, 18 FCC Rcd 7174, 7181 ¶ 23 (2003) ("Under the Supreme Court's decision in *United States v. Storer Broadcasting Co.* and its progeny, an agency that promulgates a valid rule of general application may deny individual evidentiary hearings to those who facially violate the agency's rules.") (citations omitted); *cf.*, *id.*, 18 FCC Rcd at 7180-82 nn.19-23 ("The [automatic cancellation] policy in section 319(b) also has a parallel in services where the Commission issues a license without a prior construction permit. In those services, failure to construct according to the terms of the license leads to cancellation of the license without the need for an evidentiary hearing." (citing *P&R Temmer v. FCC*, 743 F.2d 918 (D.C. Cir. 1984))).

⁶⁹ 47 U.S.C. §§ 301 – 399b; see also 47 U.S.C. § 154.

⁷⁰ *Northstar Technology, LLC, Order on Reconsideration*, 19 FCC Rcd 3015, 3022 ¶ 14 (Mobility Div. 2004) ("Northstar argues that the Commission cannot revoke its license for failure to meet its construction deadline without being afforded a revocation hearing under Section 312 The Commission's authority to impose license conditions is firmly grounded in statutory law. . . . Northstar's argument that the Commission must hold a hearing to determine whether failure to meet its build-out requirement should result in license cancellation is erroneous.") (citing *P&R Temmer v. FCC*, 743 F.2d 918, 928 (D.C. Cir. 1984)).

⁷¹ *P&R Temmer v. FCC*, 743 F.2d 918 (D.C. Cir. 1984) (Licensee's acceptance of license constitutes accession to all conditions contained in FCC's regulations and in license. "A licensee may not accept only the benefits of the license while rejecting the corresponding obligations."); see also *MMDS, Inc., Memorandum Opinion and Order*, 18

(continued...)

unconditional right were being taken away, but Leeds held the two BRS licenses at issue subject to the condition of full and timely payment of installment payments and he never obtained an unconditional right to the channels.⁷² Given that Leeds failed to satisfy a condition imposed by rule, Section 312 does not apply to this case.⁷³

23. Leeds also contends that his failure to file a timely grace period request is a non-monetary fault, which entitles him to a notice to show cause under Section 312(c). According to Leeds, "The issue of whether the licensee files the request within the allotted ninety days from the due date of the payment is not a question of whether the licensee defaulted on payments. It is simply a procedural question, or rather a non-monetary fault question, falling into the category of fault provisions triggering the right to a notice to show cause and a right to a hearing."⁷⁴ We disagree. The grace period rules applicable to Leeds are an integral part of the Commission's installment payment rules, and Leeds's failure to comply with the grace period rules cannot be treated separately from his failure to abide by the installment payment rules. Under the Commission's rules, Leeds was required to choose from two options by a date certain: either he could make his required installment payments or he could request additional time for doing so. Leeds did neither. Contrary to Leeds's arguments, his failure to file a timely grace period request does not fall into any of the categories of circumstances enumerated in Section 312(a) that may constitute a basis for license revocation, and thus does not in any way implicate Section 312 procedures.

IV. CONCLUSION

24. For the reasons stated above, IT IS ORDERED that the Petition for Reconsideration filed by Allen Leeds IS DENIED.

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FCC Rcd 15,147, 15,150 ¶ 11 (2003) ("The *MMDS Order* correctly states that when MMDS, Inc. accepted its conditional license, it agreed to be subject to those conditions.").

⁷² *P&R Temmer v. FCC*, 743 F.2d at 927-28 ("[T]his court has held that a licensee whose right to the use of a frequency is contingent on satisfying specified conditions has no right to use of the frequency when the conditions are not met. . . . The FCC did not violate the Act when it denied appellants a hearing on revocation of their channels.") (citing *Capital Tel. Co. v. FCC*, 498 F.2d 734, 740 (D.C. Cir. 1974); *Music Broad. Co. v. FCC*, 217 F.2d 339, 342 (D.C. Cir. 1954)).

⁷³ *Glendale Electronics, Inc., Memorandum Opinion and Order*, 19 FCC Rcd 2540, 2544 ¶ 10 (2004) (Commission upheld automatic cancellation of specialized mobile radio service licenses, without a hearing pursuant to Section 312, because "a license that cancels for failure to satisfy a license condition is not revoked and does not trigger a hearing requirement.") (citing *Peninsula Communications, Inc. v. FCC*, No. 01-1273, slip op. at 2 (D.C. Cir. Jan. 30, 2003)(unpublished opinion available at 2003 WL 242660 (D.C. Cir.) (FM translator licensee argued that Commission order revoked licenses without hearing as required in 47 U.S.C. § 312(c); Court held that Commission did not revoke any of the licenses but instead conditionally granted renewals and then rescinded conditional grants for failure to satisfy the condition)).

⁷⁴ Petition at 11.

25. This action is taken pursuant to delegated authority granted under provision of Sections 4(i) and 5(c)(1) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c)(1), and Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

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